BOOK REVIEWS.

TRICHOTOMY IN ROMAN LAW. By Henry Goudy, D.C.L., Regius Professor of Civil Law in the University of Oxford. Oxford: The Clarendon Press. 1910. pp. 77.

Hegel commended the Roman jurists for their frequent employment of trichotomies, which, he conceived, showed their logical power. But these three-fold divisions, in which the Roman books abound, have given great trouble to commentators and to modern jurists. Professor Goudy holds that the ingenuity which has been expended upon such trichotomies as the three precepts of the opening title of the Institutes, the triple division of the sources of Roman Law, the classification of private law into persons, things, and actions, the three kinds of possessory interdicts, and the words of the formulas, *dare, facere, praestare*, has been wasted, in that three-fold divisions were devised for their own sake and the law was forced into them as well as might be. He finds in Roman jurists, especially Ulpian, a "persistent tendency to trichotomy," even at the expense of accuracy, completeness and logic, and explains this tendency by the symbolism of numbers and the significance of the number three, as symbolic of completeness, to which the ancients attributed so much importance in other connections. This mystic importance of the number three, he shows, appears in the law in two ways: First, it survived from the old law in provisions of the Twelve Tables (*e. g.* the three sales of a son in *potestas*, the *trinoctium*, the proclamation on three market-days), in old formulas (*e. g. do, dico, addico*) and in maxims (*e. g. tres faciunt collegium*); second, it was impressed upon the classical jurists, chiefly Ulpian, by their reading of Stoic philosophers. "It is not too much," he tells us, "to say that wherever Ulpian gives a classification of an institution or doctrine into genera and species, we may expect to find it tripartite if the subject matter admits of it or may be forced into it." The twenty-eight three-fold divisions or classifications which are discussed critically go far to confirm this thesis.

Hofmann had pointed out already that symbolism of numbers plays a controlling part in the arrangement of the Digest. Sokolowski had shown how Stoic notions as to "essence" and "appearance" and "species" had influenced many texts otherwise inexplicable. Professor Goudy in a prior study (unhappily not generally available) had made a strong case for holding that the quadripartite division, subdivision and resubdivisions of obligations, so remarkable in the Institutes, must be attributed to symbolistic ideas. Add to these the present exposition of the tripartite classifications, and it must be confessed the theory is very plausible. Certainly it causes many difficulties which have puzzled jurists to disappear. Perhaps a stronger case is made, however, with respect to the trichotomies in classification, which are as a rule very artificial and often palpably faulty, than with respect to the traditional triads. Obviously the New York Code of Civil Procedure was not made under the influence of any ideas of number symbolism. Yet there are 63 three-fold groupings in that act, and if we eliminate four-fold groupings, which are next in frequency, there are not many left. As Lewis Carroll puts it, three is a "convenient number to state." It is plural and yet not too large, and suggests itself naturally. Witness three days of grace, three callings of a party in default, the *oyez, oyez, oyez* of the crier, the common statutory period of three days in which to move for a new trial, the common provision for three peremptory challenges, and the like.

An example may illustrate how cautious we should be in attributing too much to a conscious desire to make triads. Suppose a future historian were expounding the institutions of to-day along similar lines. He would begin

with the symbolism of numbers as set forth by Mackey or Albert Pike and would show the great importance attributed to the number three. He would observe that King Edward VII was an eminent Mason and that from the beginning the highest offices among English Masons have been held by noblemen. He would point out that George Washington was the master of a masonic lodge, and that the leaders of the American Revolution and American constitution makers, statesmen, judges and generals were largely Masons. Hence he would conclude the symbolic value of three, as expounded by masonic authors, was a fundamental tenet of intelligent Anglo-Americans in public life in the eighteenth and nineteenth centuries. Looking at British institutions from this point of view, he would find much to confirm his theory. He would find three kingdoms, arbitrarily excluding Wales. He would find sovereignty reposed, in theory, in King, Lords and Commons, and he would point out the long persistence of a useless House of Lords. He would refer to the three superior courts of common law, all with the same jurisdiction. After the Judicature Act, he would find three courts, the County Court, the Supreme Court of Judicature and the House of Lords, and he would remind his readers that the appellate jurisdiction of the House of Lords was restored after the original act had done away with it, and was regarded by eminent authorities as seriously impairing the judicial organization. He would find that the High Court was arranged in three divisions, that there were three judges in each department of the Court of Appeal, that High Court, Court of Appeal and House of Lords formed another trinity and that there were three heads of the judicial system, Chancellor, Chief Justice and Master of the Rolls. In American institutions, he would see the government divided into executive, legislative and judicial departments and would find the courts struggling to maintain an impossible analytical distinction along historical lines in the face of practical difficulties and at the expense of much useful legislation. He would show that the Judiciary Act provided for three federal courts and that when in 1891 a fourth was added, this impairment of the tripartite arrangement was so repugnant to American ideas of symbolism that the Circuit Court was abolished within ten years. All bills were read three times before passage, and many State constitutions expressly required this form, which was considered so sacred that statutes were declared void because it had not been complied with. Even in so practical a matter as military organization and tactics, he would say, the Americans insisted on the mystic number three. Their organization was a trinity of trinities: squads, sections, platoons; companies, battalions, regiments; brigades, divisions, corps. The Drill Regulations prescribed a regiment of three battalions, a brigade of three regiments, a division of three brigades, a corps of three divisions. Nay, the theoretical writers on tactics insisted that the correct battle-order was a formation in three lines, and this was the regular practice of the Duke of Wellington, who, we know, was a Mason! The American national game was built around the number three. There were thrice three players and thrice three innings, three bases, three outfielders, three out made an inning and the batter was allowed three strikes. The law, he would then point out, was permeated with this number three. The institutional books said that property was real, personal and mixed; that actions were real, personal and mixed; that crimes were treasons, felonies and misdemeanors; that the jurisdiction of equity was exclusive, concurrent and auxiliary; that freeholds were conveyed by feoffment and livery, fine or recovery; that a use might be raised by feoffment to uses, bargain and sale, or covenant to stand seised; that there were contracts of record, specialties, and simple contracts, estoppels by record, by deed and *in pais*, and privity of contract, of estate, and of blood. He would have no trouble in showing that many of these were arbitrary and illogical and that most of them were inadequate. Trusts were said to be express, resulting or constructive, although the last two went on the same essential principle; in

equity pleading, there were bill, answer and replication, although the latter was the merest form; a defendant in equity might demur, plead or answer, and yet all three functions were performed by answer alone; most of the codes of procedure provided for complaint, answer and reply. And so on indefinitely. This might appear a very strong case. And yet it cannot be that regard for the number three as a symbol has had anything to do with the matter or that those who drew our codes and practice acts had ever heard of such a thing.

Yet, conceding, as one must, that such speculations as Professor Goudy's may lead us too far, one must concede also that he has called attention to a point of capital importance in connection with many distinctions and classifications upon which juristic ingenuity has thus far made no impression commensurate with the time and ability brought to bear upon them. No one who has to do with the classifications of the Roman jurists in the future can afford to overlook the element of number symbolism. R. P.

THE CONSTITUTION OF THE UNITED STATES. By David K. Watson. Chicago: Callaghan & Co. 1910. In two volumes. pp. xxxiii, ix, 1959.

This work deals with the Constitution in a way that will be appreciated by any one interested either in the origin of the instrument or in the mode by which the courts have applied it to the various emergencies arising since it was framed. The historical introduction begins with the meeting in 1774 of the First Continental Congress and ends with the assembling of the Federal Constitutional Convention in 1787, giving in eighty-eight pages an account of the forces leading to a more perfect union, and also a description of the members of the Federal Constitutional Convention. Then follows the main part of the work. The plan adopted is to deal with constitutional questions in the order in which the topics arise in the Constitution itself, and to deal with each question in an historical fashion, giving, among other things, such light as is thrown upon each topic by the Articles of Confederation, the proceedings of the Federal Constitutional Convention and of the several state conventions, contemporaneous letters, later letters and speeches, and the decisions of the courts. Throughout there is ample quotation from the Journal of the Federal Constitutional Convention, Elliot's Debates, judicial opinions, and other sources. The result is a piece of work which does not duplicate any of the other treatises, but which in a useful manner supplements each of them. The time has gone by when all that is to be said as to the Constitution can be embodied in only two volumes. Consequently the plan of this work necessarily excludes an attempt to cite all the decisions and also an attempt to present in the author's own words an idealized theory of the several topics. The author is well within his rights in thus limiting his plan; for citations can be gathered easily enough from digests and the like, and discussions can be found in many specialized treatises. After setting his limits, the author has worked within those limits with obvious diligence and with as much accuracy as can be expected in a presentation of so much material. The inevitable slips appear to be unimportant. On page 38 there is clearly something wrong with the chronology. On page 785 it is erroneously said that in *Dartmouth College* v. *Woodward* "The plaintiff was successful in all the courts of New Hampshire." On page 791 it is said that in *Ogden* v. *Saunders* bills of exchange had been endorsed to Ogden, whereas in truth they had been drawn on him and had been accepted. Such minute and immaterial errors cannot cause any fair-minded reader to question the author's accuracy. Indeed it has already been said that the author's diligence is obvious. The result is a work worthy to be placed beside the other general treatises on this vast and increasingly important subject.